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PROPERTY IN THE MORAL LIFE OF HUMAN BEINGS

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I. INTRODUCTION

Property is a central concept in both political philosophy and everyday life. As we navigate the social world, make plans and choices, and coordinate our actions with our fellow humans, we have to negotiate an invisible framework of rights, duties, and permissions that both enables and limits us. To navigate this landscape, we have to make reliable judgments about who or what can own a thing, what sort of things can be owned, who owns a particular thing, and about how that shapes possible actions both for us and for others. This is not trivial. After all, ownership is not an observable property of objects, it can be transferred without any change in the location or appearance of an object, and it can persist through changes in its location, size, color, and so forth.

Yet, although this idea looks complex and seems to impose some heavy cognitive demands on ordinary people, we are remarkably successful using it and tracking its corresponding moral requirements. This is despite the fact that most people receive no formal instruction concerning property and that the idea is often sketchily dealt with even in law books and works of philosophy. Unlike other abstract notions which are more or less useful in life — such as the truths and procedures of arithmetic — people seem to be pretty good at picking up and using property as a concept. They usually have a good intuitive grasp of the idea, even if they could not give an explicit account of it. In this respect, property resembles language. Just as the native speakers of a language enjoy a remarkable facility and competence with the grammar of that language without being able to give the account of it that an expert in linguistics would, so most

people can find their way around the normative system that is property without sharing the perspective and understanding of that system that a philosopher or legal expert has.¹

This fact about property suggests either that there is an ability concerning property that is native to our species or that the ability to make property judgments supervenes on some other universally distributed native abilities, such as the capacity to make and conform with social rules more generally. If this is right, then it seems plausible that human beings have been engaged in making such judgments for a very long time, and perhaps that these judgments are interwoven with the capacities that make human sociality and cooperation possible. Yet such a view of property discrimination as a primitive capacity is in tension with another widely held position that takes systems of property to be entirely conventional and subject to deliberate choice and change. This alternative view holds that the very idea of property is conceptually dependent on the existence of institutions — states and legal systems — that have arisen only in recent historical time. If this view is right, and property is simply the creation of legislators and jurists, how are ordinary people as good with the concept as they are?

One reason why these questions matter, but also why they are the subject of much confusion and dispute, is that many people think there are significant political consequences that follow. Some (though not all) libertarians and classical liberals are keen to embrace a view that secures the status of private property as a pre-institutional *natural right*.² Conversely, some social democrats and egalitarian liberals seek to defend the idea that all property is a legal convention.³ This is perhaps because they believe that such a conception makes it easier to justify adjusting property rights to achieve fair distributive outcomes. Not that this is a straight political divide between left and right. Given the close connection between the concepts of justice and property, people who see property and justice as entirely the creations of particular legal systems can thereby argue that cosmopolitan theories of global justice are confused.⁴ Here I argue that neither of these camps has things right. Property consists both in local conventions and in native capacities to navigate and use conventional systems; and property judgments plausibly include both culturally variable elements — concerning such matters as what can be owned — and human universals.

Much of the confusion here stems from the fact that political philosophy all too often takes its account of human nature from seventeenth- and eighteenth-century debates and embraces a fairly crude distinction between the natural and the social. But modern research in fields including psychology, anthropology, and primatology tells us that we are by nature a social species with a natural capacity to devise and follow norms and with prosocial instincts to set alongside our pursuit of individual self-interest.⁵

In what follows, I subject both the philosophical and social scientific bases of some modern conventionalist accounts of property to scrutiny. After some initial remarks concerning the concept of property and the interest served by the institution, I focus on a set of three arguments employed by Kant (though some derive from Hobbes) that purport to show that the very notion of property is conceptually dependent on the state. These arguments include a mixture of philosophical and empirical claims concerning the nature and possibility of property that I suggest are weaker than they might seem. In the second half of the essay I draw on modern work in social science and psychology — particularly recent findings from developmental psychology — to argue that there is good evidence that humans have the natural capacities to sustain and navigate an institution like property in the absence of state power; I then address the difficult question of the relevance of such purportedly natural facts about humans for the justification of a normative institution. In a final section I suggest a revised and somewhat Humean conventionalism: systems of property emerge because of their usefulness to human communities, but the exact form they take is shaped and influenced by heuristics and biases that are part of our natural and biological inheritance. Those psychological dispositions plausibly inform our intuitive judgments about our own and others' entitlements in ways that lawmakers would be ill-advised to ignore.

II. WHAT IS PROPERTY?

Much philosophical argument about property rights concentrates on their justification, but, by way of background, we need to be clear about what they actually are.⁶ When a person

has a property right in something — whether an object, a piece of land, or something more abstract — he or she has at least a minimal set of rights with respect to that thing. The set includes the right to use and control the thing that is property and the right to grant or refuse permission to others to use and control it. Such rights are not necessarily absolute, since it is easy to imagine circumstances in which the rights of a property owner can and should be overridden, or in which such rights do not extend to using the object in certain harmful ways. But the having of such rights, imposing *prima facie* duties on others, is at the core of what we mean by property. While it is easy to think of the ownership relation as being a relation between a person (the owner) and what is owned (his or her property), and even to think of the fact of being someone's property as an attribute of the owned thing, property is actually a social relation between persons concerning things. Property rights assign permissions and duties to people with respect to objects. When people understand that an object is someone's property, they usually grasp, in virtue of grasping the concept, what their own duties are understood to be toward the owner and the object. This is so even in cases when people are of a mind, as thieves are, to reject or ignore those duties.

To these basic rights of control and permission or exclusion we can add others, perhaps less central to the core notion but usually important, such as rights to transfer ownership of the object. Such rights are arguably less central because a property owner can lack them; yet their control and exclusion rights still continue to structure the choices available to others. The owner of an English aristocratic estate who is bound to pass it on to the next generation and may not sell, or the owner of a theater ticket marked “nontransferable,” still have a property in the objects they own for most practical purposes.

Even where people grasp the basic idea of property, there can be considerable disagreement about closely related questions. For example, people can disagree about the kinds of thing that can be owned. Notoriously, in some cultures it is possible to own people. People may disagree about whether it is morally possible to own some natural objects. There is also little consensus about intellectual property and about the circumstances under which and limits to when an idea, an invention, or a work of art can be someone's property. In some of these cases we do need to settle matters explicitly by law, a point to which I return in the final section.

III. THE INTERESTS SERVED BY PROPERTY

There are many philosophical accounts of the interests served by property. Some of these interests are individual, others collective. I will not attempt a comprehensive survey,⁷ but it is worth noting some of the principal justifications, many of which complement rather than compete with one another. Some of these provide general reasons why property is a good institution to have. For example, for Kant property rights secure for individuals a sphere of external freedom, within which they can pursue their personal plans and projects without needing the permission of others. For Hegel, a sphere of ownership can provide people with the material to develop and express their individual personality. I assume that these are valuable possibilities and that property rights thereby serve important human interests. As David Hume noticed, the existence of a system of property rights also serves mutual and collective interests. By assigning control over assets and thereby providing people with security and foreseeability, stable systems of property enable people to cooperate in mutually beneficial ways; this helps the society of which they are a part become richer and do better than if energy were wasted on conflicts over resources and people were reluctant to invest their efforts in productive ventures.⁸

There are also considerations that justify special connections between individuals and bits of the world, such as objects, animals, land, and so on. These connections give (defeasible) reasons why particular people should own particular things. Sometimes these special connections are established by acts of initial acquisition that reflect purposive activity by people towards the world (Locke), including possession, habituation, and transformation of previously commonly owned or unowned things; sometimes they are established by acts of transfer from owners to other people. Usually these acts of property acquisition come with qualifications. Standardly, when property rights would threaten the vital interests of third parties, acts of acquisition may turn out to be impermissible. Such limits are suggested by devices such as Locke's proviso on acquisition, according to which an initial appropriator must leave enough and as good for others. As I shall suggest below, the disposition to assign ownership rights to people

who have, as creators or initial possessors, a strong purposive connection to an object or territory may have deep roots in our human nature.

IV. ARGUMENTS THAT PROPERTY RIGHTS ARE STATE-DEPENDENT

In modern discussions of property acquisition a standard contrast is drawn between natural rights and conventionalist accounts. Though conventionalism does not strictly entail that property depends on states and legal systems, that conflation is often made. In debates concerning taxation, liberal egalitarians, such as Thomas Nagel and Liam Murphy are wont to claim that the perception that individuals often have that states in taxing them are taking away their property reflects a confusion about the very nature of property and a commitment to a false natural rights conception of what property rights are.⁹ According to this view, when people believe that the state is taking away their property, they are failing to grasp the intrinsically conventional nature of property rights and that their title to their property was already subject to a modification by lawmakers that made it liable to taxation. On this view, taxation leads to no transfer of property from a private owner to the state, since the state merely applies the right it had all along to a portion of the assets. Accordingly, no question of injustice (let alone anything “on a par with forced labor”)¹⁰ can occur, and to suppose that it does just reflects the conceptual confusion of those who disagree. In this section I subject these claims to scrutiny before going on in the rest of the essay to engage with recent scientific findings that relate to our capacity to use and navigate property systems.

The view that property rights are necessarily the creation of the state as sovereign power is expressed by Hobbes, who in his *Leviathan* explained that “...where there is no coercive Power erected, that is, where there is no Common-wealth, there is no Propriety; all men having Right to all things”¹¹ According to Hobbes, without a sovereign there can be no property, but only *possession*, which lasts as long as a person is physically able to maintain it. Without an assurance that his or her own holdings will be recognized and respected by others, nobody has a good reason to recognize and respect the possessions of others. Once a sovereign power is in place, that power has the authority simply to decide on whatever rules of property seem right,

and to alter those rules at will. The view that sovereigns have such an authority to set property rights was also endorsed by both Bentham and other utilitarians — who in any case thought that all talk of innate rights was nonsense — and, perhaps more surprisingly by Immanuel Kant.

Since the view that property rights are intrinsically state-dependent is, today, asserted most strongly by liberal egalitarian philosophers influenced by Kant, I shall here concentrate on his treatment of the issue.¹² In addition to the assurance argument, Kant also advanced two further considerations. First, he argued that without a sovereign to set a framework of property law and to adjudicate disputes, property holdings must inevitably suffer from a fatal indeterminacy about who owns what. Second, noticing the truth that property is most basically not a relation between persons and things but among persons concerning things, he claimed that a sovereign authority was a necessary condition for one person to be under a duty with respect to the holdings of others. Only a set of rules that could be justified from the perspective of everyone could place individuals under a duty to respect such holdings. The alternative, in which individuals claim the right to exclude others unilaterally, amounts, claimed Kant, not to a genuine assertion of right but rather of power.

Kant took himself to have provided an *a priori* demonstration of the conceptual dependence of property on the state. On his view, the state is a necessary condition for the possibility for property: without the state, particularly in its legislative and adjudicative roles, there simply can be no such thing as property. Each of these three Kantian reasons for rejecting the very idea of property rights that are independent of the state and the legal system is, however, open to objection. In each case the argument can be met by showing that the relevant condition can be satisfied to a sufficient degree in the absence of the state. This is not to deny that states might be very useful or desirable ways of satisfying these conditions, but it is to deny that they are necessary for this.

The indeterminacy argument claims that without a state to decide on property rights, it will prove practically impossible to determine where one person's property ends and another's begins, making conflict inevitable. A philosophical claim that property rights require determinacy is therefore combined with an empirical one that in the absence of the state a determinacy

threshold will not be surmounted. This argument appears to have more plausibility than it actually does because of the possibility of raising skeptical doubts about the spatial and temporal extent of a holding. Sometimes these doubts represent real difficulties, but often they are philosophers' worries, contrived for the sake of making an in-principle objection but having little bearing on actual practice. Property rights, however, serve a practical function, giving people the possibility of security and predictability with respect to external objects. While some possible objects of ownership — particularly resources like land or fisheries — may have boundaries that are intrinsically indeterminate, other objects have clearer edges. The precise point at which a field at the edge of a village ends may be vague, but other objects such as a hunter's spear, a ball, or a cow are much more clearly delineated. Vagueness as to boundaries, even when it exists, may not prove a great practical issue because it may not correspond to any practical question where people have competing interests. Moreover, merely theoretical questions, such as indeterminacies about how far ownership extends vertically above and below a plot of land will not impinge on the use and application of property rights in societies without aircraft and which do not extract minerals from below the soil. None of this is to say that property disputes could not and would not arise in stateless societies, but that is not the worry here. The point is that there is no reason to think that on a reasonable construal of what is practically required for determinacy, indeterminacy problems are so pervasive that stateless societies could not and would not employ notions of mine and thine on the grounds that people just couldn't tell which was which.

The unilateralism argument is that property, in order to be legitimate, needs to be justified from everyone's point of view: in Kant's terminology, property has to be the expression of an "omnilateral will." This is a philosophical argument for a necessary condition on legitimate property, but the condition is probably so demanding as to subvert the practical function of the institution by ensuring that no actual systems of property meet it. Kant's thought is that central to the idea of property is the right to exclude and that this involves placing others under a correlative duty of noninterference. This can appear mysterious: where does this right to impose a duty on others and thereby to subject them to your will come from, and what reason do others have to accept it? But perhaps we should resist framing the issue like this. Rather, we should

ask whether the action of another person on the world with respect to particular objects can ever give us a reason to recognize them as having a privileged status concerning those objects. One sort of reason might flow from seeing that their relation to those objects expresses certain human interests that we also share: perhaps interests in security, stability, selfhood, personality and so on. This is not to deny that when our own most basic interests are threatened by exclusion, we might find that one set of reasons outweighs or silences another.

In any case, the requirement that for property to be possible, all must be subject to legislation from the perspective of everyone looks far too demanding to be realistic. To see this, we can ask whether *existing* property rights are justified from such a perspective. Existing property rights are guaranteed by legislation passed by states that are rather imperfect, that fail to represent the interests of all of their citizens and that impose unilateral exclusion on many outsiders (such as would-be immigrants). The idea that states actually express an “omnilateral will” is a transparent fiction. Kantians sometimes argue that we should engage with states with the presumption that they incarnate such a will, because that is a prerequisite for equal freedom, non-domination, justice, and property. But the circularity here is manifest: property is only legitimate if it issues from an omnilateral will; we should accept state legislation as representing such a will because doing so is a condition of property’s legitimacy. A realistic view of states suggests, instead, a dilemma: since no state expressing an omnilateral will exists, either property can be legitimate without depending on such a will, or, alternatively, there is no legitimate property in the world. Since the latter conclusion looks unpalatable, it seems plausible that omnilateralism is not necessary for legitimate property.

It might be objected that the dilemma I just posed for the proponent of the omnilateral will expresses matters in too binary a manner. We might instead conceive of states expressing such a perspective to a greater or lesser *degree* and of property rights guaranteed by a state as partaking of that legitimacy to a corresponding degree. The thought would be that while existing states may not fully express an omnilateral will they approximate one and — to the extent to which they do — people subject to their authority have reasons to consider themselves subject to its authority with respect to one another’s rights, including property rights. There are difficulties with such a move: for example, the will that is general with respect to the citizens of the

state concerned still remains particular in relation to the rest of the world, so there is an unresolved question about whether those outsiders (such as would-be immigrants) have good reason to respect such property rights. Another worry would be that an argument that makes the legitimacy of property a function of state legitimacy requires us to accord less moral security of tenure to otherwise identically placed individual owners as a result of the way political power is exercised in their country. But the key point to make is that Kant's claim is that an omnilateral will is a *necessary* condition for the legitimacy of any property. I can deny such a claim while conceding that an imperfectly realized collective will can be a *desideratum* for a system of property rights and that it can add to the legitimacy and determinacy of such a system and might even be necessary for *some forms* of property. I can also agree that acts of appropriation need to take account of the legitimate interests of third parties and are subject to revision in the light of those interests: but a condition such as some version of a Lockean proviso will meet that test in the absence of a state. All that I need here is to block the idea that a collective will expressed by a state is always a necessary condition: and even a single case where it is plausible to suppose that third parties are placed under a duty by an act of appropriation would achieve that.

This leaves us with the assurance argument, the conjunction of the philosophical claim that people lack a reason to treat the property claims of others as authoritative unless they have a guarantee that their own similar claims will also be respected with the empirical claim that the state is necessary for such a guarantee. Someone might press a case for such an assurance condition being necessary for the mutual recognition of property rights, by suggesting that in circumstances of great uncertainty and insecurity, where others are not refraining from seizing my possessions, it would be irrational for me to abstain from those of others. Perhaps so. But we can distinguish between requiring assurance as a precondition to recognizing the rights of others and being willing to recognize such rights in the case where one's own rights are not recognized. There is a big difference between assuming the worst and acting accordingly, and acting similarly when the worst actually obtains. The latter can be justified when the former is not: shooting in self-defense is very different from shooting first and asking questions later. The assurance condition as interpreted by Kant (following Hobbes) is therefore implausibly demanding and if taken seriously would generate an unwarranted general propensity to trigger-happiness.

The assurance argument is also undermined by the empirical claim that only the state can satisfy it. If people could be assured to the required degree — whatever that degree is — in the absence of the state, then the claim that property is only possible under a state is undermined. In fact, it turns out that even Hobbes sometimes suggests that the state of nature will contain smaller societies — set up for mutual defense — in which people will keep their agreements and, presumably, respect one another's holdings.¹³ This suggests that even on quite a pessimistic view of human nature, people can achieve a sufficient level of assurance in the absence of the state to find it rational to treat one another's putative property rights as giving them reason to desist from taking, and that therefore property rights can exist independently of states and legal systems.

V. SUPERSEDING THE NATURAL-SOCIAL DIVIDE

I have spent some time in the previous section countering arguments from Kant that assert that the state is necessary for the existence of property. My principal justification for giving these arguments such attention is that they continue to be influential. One thing that is noteworthy about them, though, is their antiquity. That is no bad thing in itself: a good argument is a good argument whenever it is made. But insofar as arguments often depend on factual premises that are superseded by later scientific information or arise within a worldview that is similarly outmoded, we ought to at least look to see whether we should take a different view of matters in the light of subsequent discoveries. Reliance on notions inherited from the seventeenth and eighteenth centuries and then recycled as the common stock of ideas through the canon is a problem with political philosophy quite generally, and debates on property are no exception.¹⁴

Standardly, debates over property involve a contrast between a natural law account of property, filtered through Locke, and the conventionalist “response” to that account, given in its most sophisticated form by Kant. There is much to learn from the ways in which Locke and Kant discussed the difficulties of acquisition, but the contrast depends in part on distinctions between natural and social that now look questionable. Take, for example, the issue of natural law. As conceived of in the seventeenth century, this is closely bound up with theological as-

sumptions, particularly about the will of God, what God's intentions are for his children, and so forth. Although we can try to secularize such ideas by emphasizing the rational aspect to natural law as opposed to its divine side, the idea that God has planted in us a faculty of moral intuition still lurks. On the other side of the seventeenth- and eighteenth-century argument is a view that understands human beings as essentially individualistic and needing somehow to use artifice to overcome the defects of our natural condition by choice and convention. According to this contrast, property must be either part of God's plan, programmed into a design that we have a filial duty to implement, or just one of the artificial structures that we must create *ex nihilo*. On such a picture the normativity of property — the reason we should take property rights to have practical authority for us — is either a consequence of God's command, which He has given us the ability to discern, or is something mysterious, problematic, and perhaps arbitrary: the product of choice, will, desire, or projection.

Contrast this with a modern post-Darwin picture of human beings. God has gone missing (or is dead!) and the natural–social distinction cannot be conceived of as mapping onto a natural–artificial one, since part of our nature just *is* to be a social species like our closest primate relatives. Though many of our social institutions are conventional and exhibit a bewildering degree of variation historically and culturally, they still depend on drives, capacities, and abilities that we possess naturally. The foremost example of this is language. Language is both highly conventional — witness the degree of variation among languages and the arbitrariness of such things as the association between words and their referents — *and* a human universal that we possess by nature,¹⁵ perhaps with its basis in a Chomskyan universal grammar, perhaps piggybacking on a capacity for gestural communication that we have inherited from primate ancestors.¹⁶

The normativity of language poses fewer problems than the normativity of ethics, at least in the sense that people engaged in communication who want to understand and make themselves understood normally have little incentive to deviate from locally shared norms. It is therefore relatively easy to give an account of the motive to adhere to such norms in terms of self-interest. Adherence to norms of morality and justice — including norms of property — is

much harder to explain and so it can come to seem mysterious that there can even be such norms and institutions in the absence of some external power — such as Hobbes’s sovereign — that guarantees compliance.

It is likely, however, that compliance with the norms of language is just one instance of a more general human predisposition to comply with rules and norms. Human beings are a highly collaborative species. Michael Tomasello’s work shows how very small children exhibit prosocial behaviors, and incline to help, inform, and share spontaneously rather than out of any calculation of private advantage. Later, these prosocial inclinations are harnessed by culture and by social institutions, which exploit emotions such as guilt and shame and the desire of individuals to create a good impression with their peers, in order to secure compliance and cooperation. Unlike other species, humans exhibit a capacity to identify with others, and to internalize collective goals and projects. Other great apes, it turns out, have the capacity to collaborate in the way suggested by rational-actor models: faced with some objective, such as getting some food, they can work with one another instrumentally to gain a reward, and this requires some ability to comprehend the actions and motives of their partners. What humans can do is far more sophisticated. We can engage in sophisticated and rule-structured collaborative activities with individuals occupying functionally distinct but complementary roles. To do this successfully requires not only a calculation of private advantage, but also the capacity to adopt the perspective of the scheme as a whole, to internalize it as a joint goal, and to understand the perspective of others toward that shared goal, including their capacity to understand what others are doing and why. We-intentionality in humans is part of our basic cooperative repertoire.¹⁷

One way of putting this point is to return to Kant’s claim that norms, including exclusionary rights, need to be justified from the perspective of everyone. Kant thought that this could only be done via the creation of an artificial institution. But if human beings are naturally disposed to have both an individual and a group-level perspective on joint cooperative ventures, then adopting and sharing the perspective of everyone (at least all members of the group) may be easier than Kant thought. This is not to deny that there is conflict between individual and collective interest such that cheaters and free-riders can be a problem, since taking the group perspective

does not entail being motivated to act on it. But groups may be quite good at detecting and punishing free-riders in practice, and biologically-grounded processes of socialization may result in individuals experiencing powerful internal obstacles that mitigate their inclinations to opportunism such as feelings of shame (with their external correlate, the human-specific disposition to blush).¹⁸

VI. OUR NATURAL CAPACITIES WITH RESPECT TO PROPERTY

One way to find out whether property rights can exist independently of the state and the legal system is to search for evidence that they actually do exist independently. For example, we can look to see whether other species have and make use of property; we can look at evidence from social anthropology concerning stateless societies; we can look at the informal use of property concepts among people who live in states to see whether that use is an application of the official account of property rights or has a life independent of the state;¹⁹ and we can look at the acquisition and use of property concepts among children to see whether this is merely the transmission of a state-based idea or has an autonomous life.

Recent experimental work by psychologists, particularly but not exclusively, with children, provides us with some interesting evidence, evidence that has hitherto received little attention from philosophers and political theorists interested in property. Much of this section therefore concentrates on reporting this work and trying to tease out some of its implications for the philosophical debate. But before doing so, I want to say something about property-rights and non-human species, because this can provide some background, albeit somewhat speculative, against which to think about property in humans.

A. Property in nonhuman animals

The very idea of property rights among nonhuman animals would appear to be absurd, for rather obvious reasons. These are that property is normative: it involves the application of rules by conscious agents who make judgments about the application of those rules to particular cases and take those rules and judgments to provide them with reasons for action. Nietzsche

famously says in the second essay of the *Genealogy of Morals*, that nature has set itself the paradoxical task of breeding an animal with the ability to make promises.²⁰ Only such a creature, a mysterious apparition against a landscape of mere instinct, could have even the possibility of using the property concept. Yet perhaps this dismissal of animal property is too quick. To be sure, most animals do not act for reasons, although there is growing evidence that some of our closest relatives are able to represent to themselves the intentions of their fellows and to use those representations as elements in their own deliberation.²¹ However, many animal species do exhibit behavioral patterns with respect to external objects and territory that resemble behaviors that humans engage in when using the property concept. Even though such behaviors are not instances of the use of that concept, it often seems natural to us to speak of them as if they are. It could very well be that — just as our ability to use language (with its rules and norms) rests upon and develops out of more primitive communicative capacities — so too our ability transparently and effortlessly to navigate a social world that is constituted in large part by property norms has a natural basis.

Some work in evolutionary biology would seem to bear this out. Scientists have argued that there may be a survival advantage to the encoding of specific rules governing the allocation of resources. This is because conflict over resources threatens to result in damage to the fighting individuals and thereby decreases the probability that they will pass on their genes. Such rules may include deferring to larger and more powerful opponents but also other behaviors such as the recognition of first occupancy. In this latter case, those in first possession may fight longer and harder to hang on to what is theirs even against much stronger opponents. This endowment effect means that conspecifics will be reluctant to challenge first occupiers and will seek alternative resources if they can. In humans, the well-documented phenomenon of loss-aversion, the tendency that people have to value what they are in possession of more highly than some functional equivalent and to hold on to that possession even when it appears not to be rational to do so may have a similar evolutionary basis. What is distinctive in humans is the willingness not only of possessors to fight hard for what they have, but of third parties to engage in norm enforcement against invaders. In the animal kingdom, the only evidence for third-party action of

this kind is among ravens.²² Encoded prudence, as it were, may provide a motive for a reluctance to deprive possessors of their resources, but there also seems to be evidence in some of our close primate relatives of begging and sharing behaviors that suggest something closer to a norm of respect for possession.²³

B Psychological evidence regarding humans

Because property plays such an important role in structuring our lives and yet also seems mysterious given that it is not an observable property of objects, the acquisition, understanding, and use of this concept raises interesting psychological issues. How do people acquire the concept and when? How do they make judgments about who owns what, or about whether a thing can be owned at all? How is property implicated in other social relationships and in conflict? Why does an abstract concept like property feature centrally in mental illnesses such as hoarding and kleptomania? In one recent survey, researchers identified twenty-one different reasons why psychologists should take seriously the psychological bases of ownership.²⁴ To summarize some of the findings of this research to date: children pick up the property concept during the preschool years and even quite young infants display some competence with the idea; acquisition of the concept does not seem to be as a result of explicit teaching; children's deployment of property norms is often not reinforced and sometimes undermined by adults, yet their attachment to those norms remains robust; and children and adults apply heuristics to judge property ownership that bear a strong resemblance to principles of acquisition from the natural rights tradition such as "first possession" and "labor mixing."

Acquisition of the property concept proceeds by stages, starting perhaps as early as nine months, when children start to establish triadic relationships involving themselves, another person, and objects in the surrounding environment.²⁵ With the advent of speech comes the use of possessive phrases occurring, perhaps unsurprisingly, when both person and object are present to the child. Before the end of the second year, children can report on the association between a person and the object even in the absence of immediate visual information. At eighteen months, children have a clear sense of themselves as proprietors of objects, asserting ownership by the use of expressions like "Mine!"²⁶ By the age of thirty months verbal information alone can es-

tablish the association.²⁷ At the age of about three, children have started to understand the notion that objects they possess might be shared or exchanged with others, though this understanding is imperfect. By the age of five

. . . children understand and experience possession at a meta-conceptual level. They now factor what others might feel or think when trading with them. Children not only possess something that they construe as potentially tradable, hence alienable . . . but also that a possession as a property can be given or exchanged based on what other people want or need. They also develop a sense of fairness they assume is shared with others and should rule exchanges.²⁸

In other words, the acquisition of the property concept is part and parcel of entry into the moral universe, and our coming to have a sense of others as equals, as participants, each with their own point of view and different needs and wants.

Development of the property concept is a gradual thing, though. Until the age of five, children may have grasped the concept of acquisition and some of the rights of permission and exclusion that go with it, but still struggle somewhat with the idea of permanent legitimate transfer in cases, such as gift-giving, where the first-possession heuristic is in conflict with the right of transfer. They may therefore wrongly believe that the recipient of the gift is not its rightful owner.²⁹ Children struggle with some other aspects of the ownership relation until even later, for example, up until the age of eight they seem to have difficulty grasping that a sleeping person can be the owner of something.³⁰

In trying to judge who is the owner of an object such as a toy, children seem to employ a heuristic of first possession, guessing that whomever they first observe in possession of the object is probably the owner.³¹ Thereafter, they are able to track the object through the sequential possession of various persons, such as other children playing with a ball, while maintaining the judgment that the first possessor is the probable owner. That this cue dominates over other

information is a remarkable fact, after all, an observer may know nothing of the history of an object before they first see it, so it might seem more rational to use the totality of available information to judge ownership rather than exhibiting a bias toward first possession. Nevertheless, when children are told stories containing additional information, first possession wins out. So, for example, when children are shown boys playing with toys that gender stereotypes associate with girls (and vice versa) and later the same toy is shown in the possession of the gender it is usually identified with, children continue to attribute ownership to the first possessor contrary to the gender stereotype. Similar results obtain for duration of play: even when the second possessor of a toy plays with it for much longer than the first possessor, child observers are apt to judge that the first possessor is the owner. There are also some indications that when creative labor is invested in an object, children are inclined to see that as generating a new ownership relation to the object.³²

Studies involving adults also bear out the strength of the first-possession heuristic. A well-known case in American jurisprudence is *Pierson v. Post* (1805).³³ Post was in pursuit of a fox, but Pierson intercepted and killed the animal. Post then brought an action against Pierson claiming the fox as his property, and was initially successful. However, on appeal to the Supreme Court of New York, the case was decided in favor of the first pursuer and not the possessor. The psychologists Ori Friedman and Karen Neary, who have tested whether children and adults tend to agree with the judgment (they do) reports that the principle is widely and cross-culturally applied and cites examples including Eskimo hunting practices, the Institutes of Justinian and the Jewish Mishnah (200AD).³⁴ Widespread agreement on the principle, in individuals of different ages, cultures and across historical periods suggests a direction of fit: it is not the judgments of individuals that conform to positive law but rather the law that bends itself to a principle of initial acquisition that people find naturally salient. Both of the prominent ways of gaining initial attachment to an object — first possession and labor mixing — are, of course, prominent in classic natural rights accounts of property ownership.

One counter-hypothesis in some of these cases involving children would be that they are simply learning from adults the rules that are present in the wider society. While it is hard to get con-

clusive evidence either way, it is worth noting that adults often use different principles in judging ownership and that they are often inclined not to reinforce but to undermine children's judgments about ownership and fairness. An example of different principles being in play is that adults are more reluctant than children to let the creative labor of an artist override the prior ownership of an artist's materials (such as a piece of clay).³⁵ Children's views are undermined when their quasi-Lockean judgments about their rights over possessions are overridden by parents whose Hobbesian interest is in conflict resolution among siblings and peers rather than in upholding entitlement norms.³⁶ In both of these cases, adult judgments and interventions would tend to inhibit rather than reinforce social learning of norms governing property. In this connection, one set of researchers observed that "[i]f property rights exist because *society* grants and upholds such rights then it is the society of children rather than that of parents that teaches children about ownership."³⁷

VII. NATURALISM, NORMATIVITY, AND PROPERTY

One way of understanding these studies is to conclude that the concept of property, together with some of the normative baggage that goes with it, is an essential component of our moral repertoire. When children acquire the ability to navigate the invisible world of property, permissions, exclusions, and so on, they enter the moral universe. Many aspects of that universe are culturally variable, but there may also be dispositions that are more deeply ingrained and which inform our understanding of property and provide a certain amount of content. For example, the endowment effect, a seemingly irrational bias and perhaps a product of natural selection, helps to underpin our early attachment of objects and get the developmental process started, and heuristics like first possession may predispose communities to favor some rules over others. But there is nevertheless a worry about the intrusion of these naturalistic elements into our understanding of property.

If our moral capacities, including our capacities for justice and, hence, our capacity to make and adhere to conventions regarding property, have a biological basis in that they have

been naturally selected for, that raises a problem about their normativity, about their supposed authority over us. It is one thing to have a positive scientific account of how humans behave; it is quite another to claim that they ought to behave in particular ways. And the mere fact that people do treat certain commands or prohibitions as having authority for them falls short of an argument that they have reason to do so. Deploying evidence from animal behavior, from stateless societies, and from the psychological development of children, then, might be thought to be irrelevant to the task at hand. Hobbes and Kant, for example, took themselves to provide not an anthropological theory about justice, property, the state, and so on, but rather a theory about the good reasons that people ought to take as having authority over them.

One possible reply to these concerns is somewhat *ad hominem*. It is to notice that many of these supposedly normative theories depend upon factual premises about human nature, about our drives and inclinations. Hobbes's account of human nature and the problem of cooperation would be a good example of this, with its assertion of individualism, of our primitive lusts for resources and status, and our fearful and suspicious character. A slightly different point would be to notice that many of the intuitive judgments that we are inclined to make and which philosophers rely upon as primitive normative inputs to their theories, for example in Locke's parables of labor-mixing, may have their origin in evolutionarily selected biases and heuristics. (Though to discover this is potentially to impugn the normative authority of those judgments and intuitions.)

The evolutionary explanation of the capacities and dispositions that sustain our ability to make and conform to rules (including rules of justice and property) is that having such capacities gave a selective advantage to our ancestors in the circumstances in which our species emerged. The conferring of such a selective advantage is arguably not a morally valuable goal in itself, but even if it were, the fact that some trait increased the probability of distant ancestors passing on their genes in the past (under very different circumstances) could not feature in an argument recommending that trait now.

However, all is not lost. One possible line of defense is consequentialist. That a disposition tends to increase inclusive fitness may not be a reason to favor it, but that it tends to in-

crease human well-being would be, so long as we grant that human well-being is a value that can feature in an argument with normative force. The traits that make extensive human cooperation possible are very plausibly congenial to our well-being as well as to our inclusive fitness; moreover, that connection is not merely accidental, since enabling us to avoid premature death from accidents, disease, or at the hands of predators is good both experientially and in terms of passing on our genes.³⁸ More troubling are the many cases in which our natural dispositions contradict what are normally taken to be the demands of morality. But here too there are things that we can say. There are two different sorts of tension at work: first between egoism and a more impersonal perspective; second between the collective standpoint of the group and the demands of an impartial moral code. The evidence suggests that nature has reduced the first tension, perhaps at the expense of exacerbating the second. Though human beings are of course tempted to prefer their own good to that of the group, there are strong psychological mechanisms and socialization pressures that also favor cooperation at the group level such that individuals bear not only the risk of punishment if they free-ride but also strong internal sanctions in the form of feelings of shame.³⁹ However, the focus here is very much on cooperation with other group members, if necessary at the expense of outsiders and, indeed, group-level willingness to cooperate can facilitate such antimoral phenomena as aggressive war against outsiders.

So natural does not entail the moral, or anything like it. However, although the mechanisms that sustain group-level cooperation — including property norms — did not evolve to promote morality and may produce results at odds with it, it seems plausible that these very mechanisms at least make genuinely moral action *possible*, such that any cooperation on a wider scale will make use of them. Critical reflection on our evolved dispositions to cooperate and on the kinds of beliefs we form as a result, as well as the facts that we also have capacities to think logically and we value consistency, can lead us to extend the scope of our moral concern beyond our immediate group. This does not involve the rejection of our evolved cooperative dispositions but their enlistment in the service of a more comprehensive moral vision.

VIII. IMPLICATIONS

What I have aimed to show here is that the concept of property plays an important part in our collective moral life and cooperative projects both prior to and outside of institutions such as states and legal systems. Whereas a more statist view of property affords such institutions a free hand to shape property norms at will, on the approach defended here, institutions are somewhat constrained by the norms, biases and inclinations — partly biological, partly cultural — that are part of our natural endowment. Crucially, I resist the move from the claim that property is conventional in nature to the conclusion that property norms are simply the creatures of legislation. Rather, the picture offered here turns out to be somewhat Humean (with a Darwinian twist).

Hume thought of systems of property as being conventional in character and rejected natural rights accounts. He thought that systems of property rights had evolved over time in virtue of their general usefulness and mutually beneficial character. For him, the state comes into the picture later in virtue of the need for adjudication and the enforcement of rights that have conventional and cultural origins.⁴⁰ The Darwinian twist has two aspects to it. The first is to note that though the rules that structure social life in different human communities exhibit great variation, the underlying propensity to make and comply with cooperation-facilitating rules and strongly to internalize the desire to conform to them (as well as correlatively the desire to punish offenders) likely has a biological basis. Humans have the capacity to take the perspective of the cooperating group as well as that of their own advantage, and rule-following and reactive attitudes to rule breaking are part of that endowment. The second is that although particular rules are conventional, particular rule choice may not be entirely arbitrary but may be shaped by heuristics and biases that themselves have a biological origin. Specifically, the phenomena of loss-aversion, the first-possessor heuristic, and a propensity to favor a close connection between makers and what they make may have such a basis. Insofar as the intuitions and judgments relied upon by natural rights theorists of property have their basis in such propensities, then, we also may have effected a partial reconciliation between Hume and John Locke. Just as social practices are selected and survive on the grounds of their usefulness (including their possible contribution to biological fitness) so the biases and heuristics that underlie rule-choice and favor

certain moral intuitions may have their roots in adaptations (or preadaptations) that increased the chances of our ancestors passing on their genes.

Such a picture leaves rather open questions such as the extent of legitimate property rights in the modern world. After all, insofar as our moral propensities have biological origins, the circumstances in which they were selected for differ radically from those we now find ourselves in. Instead of cooperating in small and mobile bands we live in a rather sedentary fashion, are subject to states with millions of citizens, and take part in a global network of cooperation and division of labor. We cannot therefore *assume* that practices that have evolved to be socially beneficial in one set of circumstances will continue to be beneficial in a different set. Moreover, many of the forms of property that obtain in the modern world, such as intellectual property, rules governing inheritance, and ownership of somewhat abstract entities such as stocks and options are largely constituted by the state and its law. So even though the conceptual claim that property as such intrinsically depends on the state may not be correct, it turns out to be contingently true for a good deal of modern property.

That might seem to leave the field open for a reassertion of the statist-conventionalist claims made by writers such Nagel and Murphy. But we should resist such a conclusion. If the inclinations people have to affirm connections between individual agency in creation or possession and rights of ownership are deeply embedded reactions that are partly constitutive of our everyday moral competence, it would be sensible to take account of that when drafting, for example, schemes of intellectual property.⁴¹ And when positive law is too sharply at variance with people's intuitions about creation and possession, we can expect them to respond with a sense of resentment and injustice as their perceived deserts or entitlements are thwarted. The legitimate extent of property rights is a matter of legitimate controversy and argument, and intuitions that have their origins in much simpler societies than the ones we live in may be unreliable guides in a world where markets and the division of labor have global scope. But when people affirm their ownership of artifacts that they have created or of land that they and their families have invested in, it is a mistake to think that they are simply making a conceptual error about the nature of property. Rather, they are insisting on the importance of pre-institutional attachments and dispositions that a complete view of property must be sensitive to.

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- ¹ Frank Snare, "The Concept of Property," *American Philosophical Quarterly* 9, no. 2 (1972): 201.
- ² Such as, most famously, Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).
- ³ A view most strongly expressed recently in Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (New York: Oxford University Press, 2002).
- ⁴ For example, Thomas Nagel, "The Problem of Global Justice," *Philosophy and Public Affairs* 33, no.2 (2005): 113-47.
- ⁵ In this essay, I refer most to the work of Michael Tomasello such as his *The Origins of Human Communication: The Jean Nicod Lectures* (Cambridge, MA: MIT Press, 2008) and *Why We Cooperate* (Cambridge, MA: MIT Press, 2009), but other work such as Christopher Boehm, *Hierarchy in the Forest: The Evolution of Egalitarian Behavior* (Cambridge MA: Harvard University Press, 1999), Christopher Boehm, *Moral Origins: The Evolution of Virtue, Altruism, and Shame* (New York: Basic Books, 2012), and Frans de Waal, *Primates and Philosophers: How Morality Evolved* (Princeton, NJ: Princeton University Press, 2006) fits in the same general space.
- ⁶ Here, I take Snare, "The Concept of Property," as a guide.
- ⁷ For that, Jeremy Waldron, *The Right to Private Property* (Oxford: Oxford University Press, 1988) remains unsurpassed.
- ⁸ For a recent work arguing the importance of a stable system of property rights for economic growth and development, see Hernando de Soto, *The Mystery of Capital* (New York: Basic Books, 2000).
- ⁹ Murphy and Nagel, *The Myth of Ownership*, 9.
- ¹⁰ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 169.

¹¹ Thomas Hobbes, *Leviathan*, ed. Noel Malcolm, The Clarendon Edition of the Works of Thomas Hobbes (1651; Oxford: Oxford University Press, 2012), vol. 2, 220.

¹² These three Kantian arguments are set out “The Doctrine of Right” which forms part of *The Metaphysics of Morals* and is included in *Practical Philosophy*, ed. Mary J. Gregor, The Cambridge Edition of the Works of Immanuel Kant (1797; Cambridge University Press, 1996). I draw on the presentation of the arguments in Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), ch. 6; See also Allan Gibbard, “Natural Property Rights,” *Nous* 10, no. 1 (1976): 77–86.

¹³ See Hobbes, *Leviathan*, p. 224.

¹⁴ Arguably, another way in which such anthropological antiquarianism persists is via the influence and prestige of modern economic theory, to the extent to which it relies on the stock figure of *homo economicus*, the individual rational utility maximizer. I say, “to the extent” to indicate an awareness that modern utility theory is formally indifferent to the content of people’s preference functions, which can be egoistic, altruistic, or anything you like. This does not altogether banish the older figure from the tacit assumptions made in much economic thinking.

¹⁵ Remarkably, Murphy and Nagel, *The Myth of Ownership: Taxes and Justice*, 74–75 rely on the conventional nature of language as a parallel with property to bolster their case for the dependence of property on positive law, seemingly not noticing that language has its natural side too.

¹⁶ This latter view derives from Tomasello, *Origins of Human Communication*. Tomasello is skeptical about Chomskyan universal grammar.

¹⁷ See Tomasello, *Why We Cooperate* and particularly Tomasello, *Origins of Human Communication*, ch. 5. Tomasello in turn draws on work on joint intention pioneered by philosophers such as Margaret Gilbert in her *On Social Facts* (Princeton: Princeton University Press, 1989).

¹⁸ On blushing, see Boehm, *Moral Origins*.

¹⁹ On this, see, for example, Robert C. Ellickson, *Order Without Law* (Cambridge, MA: Harvard University Press, 1991). Hernando de Soto, *The Mystery of Capital*, chapter 5 has interesting discussion of how informal property holdings in the United States often predate their formal legal recognition.

²⁰ Friedrich Nietzsche, *On the Genealogy of Morals*, ed. Keith Ansell-Pearson (1887; Cambridge: Cambridge University Press, 1994), 38.

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- ²¹ See Tomasello, *Origins of Human Communication*, ch. 2.
- ²² For discussion see J. E. Stake, “The Property ‘Instinct’,” *Philosophical Transactions of the Royal Society B: Biological Sciences* 359, no. 1451 (2004): 1763. On the evolution of behaviors favoring first possession, see John Maynard-Smith and G. A. Parker, “The Logic of Asymmetric Contests,” *Animal Behaviour* 24 (1976): 159-75. The connection to the endowment effect is discussed in Herbert Gintis, *The Bounds of Reason: Game Theory and the Unification of the Behavioral Sciences* (Princeton: Princeton University Press, 2009), ch. 11.
- ²³ As reported by Sarah F. Brosnan, “Property in Nonhuman Primates,” *New Directions for Child and Adolescent Development* 132 (2011): 9–22.
- ²⁴ Ori Friedman and Hildy Ross, “Twenty-One Reasons to Care About the Psychological Basis of Ownership,” *New Directions for Child and Adolescent Development* 132 (2011): 1–8.
- ²⁵ Philippe Rochat, “Possession and Morality in Early Development,” *New Directions for Child and Adolescent Development* 132 (2011): 30-1.
- ²⁶ Ibid., 32.
- ²⁷ Peter R. Blake and Paul L. Harris, “Early Representations of Ownership,” *New Directions for Child and Adolescent Development* 132 (2011): 39–45, drawing also on earlier work by Michael Tomasello.
- ²⁸ Rochat, “Possession and Morality in Early Development,” 34.
- ²⁹ Peter R. Blake and Paul L. Harris, “Children’s Understanding of Ownership Transfers,” *Cognitive Development* (2009).
- ³⁰ Nicholas S. Noles and Frank C. Keil, “Exploring Ownership in a Developmental Context,” *New Directions for Child and Adolescent Development* 132 (2011): 97
- ³¹ Ori Friedman and Karen R. Neary, “Determining Who Owns What: Do Children Infer Ownership From First Possession?” *Cognition* 107, no. 3 (2008): 829–49; Ori Friedman, “First Possession: An Assumption Guiding Inferences About Who Owns What,” *Psychonomic Bulletin & Review* 15, no. 2 (2008): 290–95.
- ³² Patricia Kanngiesser, Nathalia Gjersoe, and Bruce M. Hood, “The Effect of Creative Labor on Property-Ownership Transfer by Preschool Children and Adults,” *Psychological Science* 21, no. 9 (September 2010): 1236–41.

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- ³³ *Pierson v. Post*, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. 1805).
- ³⁴ Ori Friedman and Karen R. Neary, “First Possession Beyond the Law: Adults’ and Young Children’s Intuitions About Ownership,” *Tulane Law Review*, vol. 83 (2009).
- ³⁵ Kanngiesser, Gjersoe, and Hood, “The Effect of Creative Labor on Property-Ownership Transfer by Preschool Children and Adults.”
- ³⁶ Hildy S. Ross, “Effects of Ownership Rights on Conflicts Between Toddler Peers,” *Infancy* (March 2012): no—no PLEASE PROVIDE PAGE NUMBERS; Hildy S. Ross, Cheryl Conant, and Marcia Vickar, “Property rights and the resolution of social conflict,” *New Directions for Child and Adolescent Development*, 132 (2011): 53–64.
- ³⁷ Ross, Conant, and Vickar, “Property Rights and the Resolution of Social Conflict.”
- ³⁸ For an interesting argument to this effect, see Kevin Brosnan, “Do the Evolutionary Origins of Our Moral Beliefs Undermine Moral Knowledge,” *Biology and Philosophy* 26, no.1 (2011): 51-64.
- ³⁹ This is one of the central themes of Boehm, *Moral Origins*.
- ⁴⁰ See, David Hume, *A Treatise of Human Nature*, eds L. A. Selby-Bigge and P. H. Niddich, 2d ed. (Oxford: Clarendon Press, 1978), 484–501.
- ⁴¹ It might be thought (for example) that this is exactly what documents such as the Berne Convention do, when they recognize the moral rights of authors.

